

Adventures of Lewis & Clarke, Their Day in Court, and the Implications for Oklahoma Tribal Employers

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In 1804, American explorers, Lewis and Clark, led an expedition through the uncharted American interior to the Pacific Northwest. Now, more than two centuries later, another Lewis and Clarke are taking the nation into uncharted legal territory with a United States Supreme Court case that will help determine the scope of tribal sovereign immunity. This term, the Supreme Court will decide the question, “Does tribal sovereign immunity extend to individual tribal employees acting in the scope of their employment or may a plaintiff proceed solely against an employee in his individual capacity?” This discourse explains what the answer to this question could mean for Oklahoma employers and makes recommendations on how management should respond from the perspective of a Human Resource professional.

On October 22, 2011, Brian and Michelle Lewis (the Petitioners) were driving south on Interstate 95 in Norwalk, Connecticut, when a limousine struck their vehicle from behind. Driving the limousine was William Clarke (the Respondent), an employee of the Mohegan Tribal Gaming Authority (MTGA). The Respondent “was driving patrons on the Mohegan Sun Casino to their homes,” when he drove the limousine into the back of the Lewis’ vehicle (Krisch, 2013). The limousine was owned and insured by the MTGA, and neither the Petitioners nor the Respondent dispute that the accident happened while Clarke was acting within the scope of his employment as a limousine driver for the MTGA. The crash caused injuries to both Petitioners, and they sought a remedy for their suffering (Krisch, 2013). Here is where it gets interesting: The MTGA is a constitutional entity of the Mohegan Tribe of Connecticut with governmental and propriety powers. Understanding the MTGA as a tribal government entity is crucial because tribal government entities are entitled to immunity from lawsuits filed in state and federal courts under current law. This protection is known as tribal sovereign immunity. Tribal sovereign immunity mirrors diplomatic immunity, as diplomats also are immune from lawsuits filed in U.S.

courts, but it is different in that tribes can be sued in state or federal court if the tribe consents or a congressional waiver is granted (Duhaime, 2017). U.S. courts have set precedent holding that Indian tribes have original, natural rights to self-governance; however, given that tribes function within the borders of the United States, tribes are still subject to the powers of the U.S. legislative branch. In the words of the Supreme Court, tribes are deemed “domestic dependent nations” with sovereign power limited only by the plenary power of the Congress. Therefore tribes may not be sued outside of tribal courts by any state or the citizens of any state (Office of the Attorney General, 1995).

The Petitioners initially sued both the MTGA and the Respondent, but two days later they withdrew their claims against the MTGA. They proceeded to press claims solely against the Respondent in his individual capacity claiming that “they sustained injuries as a result of the defendant’s negligence and carelessness” (Krisch, 2013). The Respondent moved to dismiss the allegations on the basis that the Superior Court lacked subject matter jurisdiction (in the state court) due to tribal sovereign immunity. The Petitioners opposed the motion, claiming that the court did have subject matter jurisdiction since tribal sovereign immunity does not extend to a tribal employee in his or her individual capacity when damages are sought from the individual employee and not the tribe. According to the Petitioners, while a tribe may not be sued outside of tribal court by the state or citizens of the state, an individual tribal employee does not enjoy the same immunity.

The Superior Court agreed with the Petitioners, determining that subject matter jurisdiction could be granted since the Petitioners sought a remedy from the Respondent personally and did not seek damages from the MTGA. It is important to note that the MTGA maintained a statutory duty to indemnify employees according to the Mohegan Indian Tribe of

Connecticut Code of Ordinances, which means that according to their own statutes, the tribe was responsible to aid in paying the lawsuit (§§ 4-52 & 4-53), but the Superior Court determined that these were “voluntary undertaking[s]” (Library, 2017). Thus, the Superior Court decided they could hear the case using a narrow interpretation of tribal sovereign immunity, asserting that it extends only to the tribal government entities and not to individual tribal employees. On appeal, the Connecticut Supreme Court unanimously reversed the decision, holding that the Respondent was indisputably working as a tribal employee within the scope of his employment and was therefore entitled to tribal sovereign immunity. The Connecticut Supreme Court also asserted that tribal sovereign immunity is a “core aspect” and “necessary corollary” to Native American sovereignty and self-governance, and given the precedent set by most courts, tribal sovereign immunity extends to employees of the tribe working within the scope of their employment (Krisch, 2013). In other words, the Connecticut Supreme Court asserted a broad interpretation of tribal sovereign immunity that extended to the individual tribal employee, and therefore the state supreme court determined that the lower court did not have jurisdiction to hear the case. The U.S. Supreme Court is now considering this case and will make a final ruling on the appropriate interpretation of tribal sovereign immunity when determining jurisdiction in lower courts.

Figure 1.1, Review of Court Decisions



So, what does all this mean and why does it matter? In Oklahoma, the outcome of this case matters a great deal. While Native Americans account for about 0.5% of the total population of Connecticut, they account for about 9.1% of the total Oklahoma population (Norris, Vines, & Hoeffel, 2012). Not only are Indian tribes collectively the largest employer in Oklahoma, but tribal gaming offers competitive wages to employees who otherwise may have few employment options (Cherokee Nation News Release, 2006). In fact, according to a report by the Oklahoma Indian Gaming Association, tribal gaming accounted for one in every 55 jobs within Oklahoma and for 2.5% of the private production revenue in 2014. In total, it is estimated that tribal gaming impacts Oklahoma's economy by \$6.9 billion annually (Dean & Robison, 2015). In contrast, according to the last report completed on the impact of tribal gaming on Connecticut's economy, tribal gaming impacted Connecticut by only \$3.3 billion annually (Carstensen & Lott, 2000).

These figures paint a picture of how many Oklahoma tribal employers and Oklahoma constituents may be affected by the outcome of this case. While a Supreme Court ruling on the interpretation of tribal sovereign immunity will have notable effects on Connecticut, the impact will be magnified in Oklahoma where tribal employment and gaming are more central to the state's economy. Understanding the reach of this decision should motivate Oklahoma tribal employers to be prepared with an appropriate managerial response once the Supreme Court rules. The goal of this current discourse, however, is not to make legal recommendations or attempt to interpret the law, but rather to provide clarity and strategies in response to the ruling through the lens of the human resource professional for the benefit of all Oklahoma employers and especially tribal employers.

I. Implications of a Narrow Interpretation of Tribal Sovereign Immunity for Tribal Employers

A narrow interpretation of tribal sovereign immunity means that tribal employees may be taking on greater risk than non-tribal employees. Take for example a limousine driver for a hotel. In the case of an accident where the limousine driver is acting within the scope of his or her employment, the hotel could be vicariously liable because of the rule of *respondeat superior*. Also known as the master-servant rule, respondeat superior means “let the master answer” and is a doctrine that asserts the principal organization (in this case the hotel) is responsible for the acts of their agents (Rottenstein Law Group LLP, 2014). In a successful lawsuit filed by an injured plaintiff, therefore, the company would be responsible to pay damages in a lawsuit; obviously, this fact makes insurance coverage a necessity for employers. Though the limousine driver also retains liability in the accident, the plaintiffs are likely to focus most of their attention on the company since the company would have a “deeper pocket.”

In contrast, a narrow interpretation of tribal sovereign immunity would mean that the limousine driver could be sued in state and federal court, but not the tribal entity, which would have no responsibility to pay for damages. If the Court rules this way in the current case, the Respondent, William Clarke, would have to bear the burden of the accident on his shoulders. If we extend this understanding to all tribal employers in the Oklahoma, the big question becomes: If U.S. Supreme Court decides Tribes are immune from lawsuits in state and federal courts but their employees are not, who is going to want to work for the tribe?

Of course in Oklahoma, casinos and other tribal entities may still be liable for the tortious acts of their employees when a lawsuit is brought in tribal court; however, even this factor does not decrease the potential risk of individual liability for tribal employees. Though tribal courts

are subject to precedent decided by the United States Supreme Court, they are not required to follow precedent set by the state courts. Tribal court outcomes then may be less predictable than state and federal court outcomes. In addition, tribes have the sovereignty to run their courts according to their own traditional practices and customs, which can be intimidating to lawyers who are unfamiliar with those practices. Many attorneys, therefore, tend to avoid litigation in tribal court, either out of a lack of knowledge or a bias against the tribal court system. A narrow interpretation of tribal sovereign immunity would give these lawyers even more incentive to avoid tribal court and seek damages for their clients in a familiar state or federal court setting. Thus it will be the tribal employees and not the employers that will suffer from these lawsuits.

In order to recruit and retain a qualified workforce, and maintain a safe working environment, tribes should update their policies, increase safety training and thorough onboarding procedures, and implement incentive programs. Employees are a business's greatest asset and they must be protected. Not only are well-trained employees critical to maintain day-to-day operations, but in the hotel/gaming industry, employees may provide employers with a critical competitive advantage. Tribes also have an ethical and often a constitutional responsibility to protect their people, and under a narrow interpretation of sovereign immunity, this may require change. The following is a list of policy and strategy revision recommendations for tribal employers to seriously consider in order to protect their employees and enhance safety in the workplace.

A. Tribal Employers should Consider Indemnifying Employees

Tribal employers should seriously consider contractually agreeing to indemnify any employees who are found to be individually liable but who were acting within the scope of their employment. To help recruit employees or keep current employees from seeking employment

elsewhere, tribes can contractually agree to indemnify employees. Indemnification is a promise to cover an employee's losses in a lawsuit, so long as the employee was acting within the scope of their employment. An employee's scope of employment refers to the activities they are required to complete in furtherance of the duties that are owed to their employer, and where the employer is, or could be, exercising some control over the activities of the employee (West's Encyclopedia of American Law, Edition 2, 2008). By using a carefully drafted indemnification clause in their contracts with employees, tribes are basically acknowledging that the doctrine of *respondeat superior* that applies to other employers also applies to them in certain circumstances. When drafting an indemnification clause, of course, tribal employers should include the definition of "gross negligence" and state clearly that the tribal entity will not cover any damages awarded for torts occurring outside of the scope of employment. Tribes also should consider capping the amount the tribe will indemnify in order to mitigate the risks associated with such a policy.

B. Tribes should Clearly Define the Scope of Employment

As noted, clearly defining what constitutes the scope of employment for tribal employees also may help limit any potential risk resulting from contractually agreeing to indemnify tribal employees. The tasks that each employee are responsible for performing should be made clear and explicit in the employment agreement. In doing so, the tribe can help the employee not only better understand their job, but also what type of behavior might be considered gross negligence.

To better understand how to define the scope of employment, it is important to review the precedent set by the U.S. Supreme Court's landmark decision in *Birkner v. Salt Lake County*. *Birkner* established the criteria that is used for determining an employee's scope of employment, including the implications that determination has on employee accountability (Rabin, 2000). The first criterion states that the employee must be committed to and completing the work they were

hired to perform, including any special duties and tasks assigned to them, as opposed to undertaking exclusively personal activities. That means the indemnification agreement would only cover accidents that took place while the employee was carrying out their job duties and not accidents that occurred while an employee was performing personal activities not permitted by the company. For example, if a written employment agreement for a limousine driver dictates that the employee is responsible for taking customers from the casino to their homes but does not allow the employee to use the vehicle for personal use, if the employee has an accident while driving to the grocery store, the company would not be responsible for the accident. The second criterion considers whether the action in question occurred within the scheduled work hours and physical boundaries of the individual's employment. This means that if an accident occurs on an employee's way home from work, while the employee is off the clock and/or not on company property, then the employer would not be responsible for damages resulting from the accident. The third criterion, which encompasses the ideas stated above, requires that the employee must have been working to serve the employer's interest when the incident occurs (Rabin, 2000). Therefore, by clearly stating the activities the employee is responsible for, the employer sets boundaries on their potential liability under the indemnification agreement. Tribal employers should avoid broad task statements, and instead tailor them narrowly to the needs of each position.

It is important to remember that, as the scope of the employment expands, so does the employer's potential liability. It is currently an attractive trend in the employment relationship to allow for employment practices that may blur the lines between an employee's personal life and his professional life. For example, technologies that allow employees to work from home or that provide flexibility in working hours have created an employment environment where an

employee's personal and professional life may run together (Graham, 2017). While this flexibility can be an attractive recruiting tool, it also may increase the risk of liability for the tribe once it agrees to indemnify employees. Tribes should work to set clear boundaries between their employee's work life and personal life, and give explicit direction about expectations for employees on company time or using company property.

C. Tribes should Consider Requiring Commercial Driver's Licenses

For employers to be more confident in the quality and accountability of their drivers, tribes should consider requiring employees to maintain a Commercial Driver's License (CDL). According to the Oklahoma Department of Motor Vehicles, "A commercial driver's license (CDL) is a special license issued by the State of Oklahoma that will allow you to drive certain types of vehicles" (DMV.ORG, 2017). In fact, some vehicles may only be driven if the driver is in possession of a CDL. These vehicles include any single vehicle with a gross vehicle weight rating (GVWR) of 26,001 lbs. or more or any vehicle carrying hazardous material (DMV.ORG, 2017). In the Oklahoma, taxi drivers and limousine drivers are not required to obtain Commercial Driver's License, but it is a good business practice to require all employees who transport passengers to obtain their CDL in your company's policy.

For example, the requirements are much more rigorous for drivers to receive a CDL than a regular driver's license. Among these extra requirements are age requirements, an excellent driving record, road safety knowledge requirements, and a rigorous physical driving and vehicle knowledge test. If you wish to drive a commercial vehicle within Oklahoma, you must be at least 18 years old. If you wish to drive interstate (outside of Oklahoma) you must be 21 years old. The certification process begins with a general knowledge test that must be passed with a score of 80% or better. Employees planning to drive a bus, taxi, or limousine also should be

required to take and pass a passenger transport test. There are also specific tests for doubles/triples, for vehicles with air brakes, for tankers, and for hazardous materials transport (DMV.ORG, 2017). While Oklahoma does not require someone to enroll in any prep-course in order to complete their CDL training, these courses are highly recommended and could be required by company policy.

The State Department of Education (SDE) also has specific guidelines that could be used as a rubric for possible tribal training guidelines for the transport of merchandise or passengers. Under the standards provided by the SDE, all bus drivers must complete classroom instruction and in person, behind-the-wheel practical education (DMV.ORG, 2017). There is no definitive amount of behind-the-wheel experience needed for the test, but the SDE recommends at least four hours of driving daily over the course of five labor-able days. In addition to requiring coursework directly from a credited institution, the program has been developed in a way that should not hinder those who may have time constraints for training. For example, bus drivers may train directly with the school district that hired them during regular working hours, or through evening classes that are offered at several vocational schools across the state. As an optional additional step, the completion of an online course approved by the SDE fulfills certain requirements for further specializations and expertise (DMV.ORG, 2017). Implementing the SDE's model for safe driving requirements should help decrease the tribe's risk for a lawsuit and perhaps increase the tribe's reputation for safety. In addition, some insurance providers will reduce the cost of insurance if all the tribe's drivers are required to obtain a commercial driver's license. Adding this provision to your employee policy statement, therefore, is highly recommended.

D. Tribes should Clearly Define Disciplinary Procedures for Employees

When it comes to increasing safety, correctly handling employee discipline is vital. First and foremost, all rules must be in writing and should be consistently enforced. There may be an assumption that some safety expectations are already part of an employee's common knowledge—like obey all traffic and parking regulations—but all such expectations should be included in an employee handbook or other company materials; posting these policies where appropriate also may be beneficial. This way, there are no surprises or excuses for safety violations. Tribes also should use progressive discipline consistently for minor violations, and these policies should include corrective action measures.

Successful corrective action measures begin with writing an effective corrective action plan. An employee corrective action plan should encompass the action steps that are expected from the time of the violation to the resolution of the issue. The first step is to document all performance issues that need improvement. Supervisors should be objective when documenting the specific facts of the infringement, and should cite to the specific company policy or expectation that the employee failed to meet. This information will become important if the action results in harm for which the company may be liable. The best way to track this information and use it for constructive purposes is to use a standardized performance improvement plan (PIP) document that is filed on the company's online database with a copy to the employee. PIPs should include the employee's information, the date of the infringement, the type of infringement, a citation to the policy or expectation that was not met, an objective description of the employee's actual performance or actions, a description of the consequences laid out in company policy for that type of infringement, a plan of action moving forward, and the signatures of both the employee and the supervisor (Society for Human Resource Management, 2017).

To be the most effective, the PIP should be tailored to each individual case and should be drafted in collaboration with the employee when possible. By eliciting employee feedback and incorporating them into the process, managers can smooth out misunderstandings and encourage employees to take ownership over the PIP. Additionally, when the manager has the meeting with the employee to discuss the issue, the manager should be trained to investigate why the infringement took place. This feedback should be taken seriously, and passed on to Human Resources in case any updates need to take place during employee training or onboarding. This feedback also can be used by managers to make decisions on whether any additional resources or time are necessary to complete a task safely and effectively (Society for Human Resource Management, 2017).

Finally, managers need to evaluate the performance of the employee to make sure any corrective action that was recommended was taken. Typically, an employee will stay on a PIP for 60 or 90 days. A third party—either an upper-level manager or a Human Resource professional—should be included to make sure goals are met. At the end of the specified period, if expectations are still not being met, then the manager and the employee should revisit the PIP. If the employee is striving to do better, then a manager may choose to extend the PIP for additional time. If the manager determines that the plan of action established in the PIP was unduly difficult, then the PIP may be rewritten and extended or ended at the manager's discretion. If employee is simply unable or unwilling to make the changes necessary, then relocation, demotion, or termination should be considered and the employee should be notified. If at any time the employee is found to be grossly negligent or blatantly disregarding the action steps laid out in the PIP, the employee should be terminated (Society for Human Resource Management, 2017).

If employers are inconsistent with how they handle safety violations, employees may become disgruntled and may not take policy seriously. When tribes set clear expectations and impose consistent discipline employee morale should improve because employees will know that employer discipline is fair. Employers should strive to create a culture where safety is expected, rules are followed, and discipline feels constructive rather than strictly punitive. In this environment, employees are freer to do their best work while keeping safety a priority.

E. Tribes should Use Safety Incentive Programs

Employers should do more than simply discipline employees for safety violations. Employers with a serious commitment to safety should fund incentive programs to help motivate their employees to strive for excellence. Incentive programs can also be used to motivate employees to go beyond the minimum requirements of their jobs, since there may be some fear in doing so with the increase in personal liability.

The more creative the employee reward programs, the more likely they are to elicit employee buy-in. The internet is full of excellent and creative suggestions for how to reward employees. A good resource for tribal employees, for example, is insperity.com. Some creative ways to reward your employees for quality and safety that are listed on that website include:

- CEO for the day – let an outstanding employee proclaim a “jeans day” or potluck dinner for their coworkers, or ask him or her to make a speech at a team meeting
- Team shopping spree – give each employee an amount of money for a trip to the mall equivalent to the hours of accident free working time
- Host annual employee appreciation dinners and company parties if safety goals are met

- Wall of Fame – post team awards, employee pictures, and department safety hours on a wall near a break room or other employee area. The wall should be encouraging and motivating (Insperity Staff, 2016)

Incentive programs demonstrate to employees that the company values safety, and is willing to put forth funding to insure business practices are done correctly. Employers do not have to spend an enormous amount on incentive programs, rather they just need to have enough funding to motivate employees to meet company goals. A simple cost-benefit analysis would no doubt demonstrate that incentive programs are a much more cost-effective option than paying for court costs and damages for tortious actions. In addition, engaging reward programs can boost employee morale and team cohesiveness.

F. Tribes should Provide Employees with “Due Process”

As a final recommendation for policy changes, tribal employers should review all their employment policies and make sure they provide employees with a framework that provides employees with “due process” in the employment environment. This framework should outline the procedure for employee grievances and strive for fairness in the employment arena, just like the Due Process clause in the U.S. Constitution requires fairness in actions involving state and federal governments. Since tribes can only be sued in tribal court, there may also be a misconception among employees that they cannot sue a tribal employer outside of tribal court for tortious acts or incidents that caused the employee harm. By instituting a more formal policy or framework indicating that the tribe supports due process, the tribe may reassure their employees that a fair process addressing unsafe or unfair practices that may have caused an employee undue harm is available. Such a framework could serve as an excellent example of the tribe’s commitment to honesty and ethical business practices. Of course, any due process

framework should be followed consistently and all employee concerns should be taken seriously.

G. Tribes should Engage in Regular Safety Training

Once all policies and procedures have been updated and finalized, tribal employers should require mandatory training for all employees regarding the changes and new expectations. At the meeting, tribal employers should explain what “gross negligence” is and explain to employees their potential personal liability in such cases. New employment agreements that include the updated scope of employment descriptions should be written for each position and provided to employees; a signed acknowledgement that such information was received by each employee should be maintained. Any duties or responsibilities listed on the new scope of employment documents that were not covered in an initial safety training should be discussed and documented. Accurate records should be kept of all training, and safety checks should be implemented regularly. Feedback loops should be structured to continuously improve quality and safety procedures.

New employees should be required to attend safety training and demonstrate their ability to safely perform each assigned task under the supervision of a manager before performing the tasks on their own. In addition to a signed copy of the employment agreement, which clearly states the employee’s responsibilities, new employees should receive written expectations of quality from their manager, as well as the policies and procedures in an employee handbook. It is also a good business practice to inform new employees of the company culture including expectations like dress codes, late policies, and incentive programs. Onboarding procedures should also include several checkpoints within the first 90 days where new employees can ask questions and provide feedback to the employer.

In conclusion, a narrow interpretation of tribal sovereign immunity may increase the personal liability of tribal employees. In order to remain competitive in recruiting and retaining a qualified workforce, which is an essential to maintaining a competitive advantage for tribal entities running businesses like casinos, tribal employers should consider offering to indemnify their employees who have accidents while working within the scope of their employment. Tribal employees can mitigate their risk of using indemnification agreements by taking time to consider the tasks and responsibilities of each position, and updating employment contracts to reflect the duties and responsibilities appropriate for employees in those positions. Employees should be educated about the scope of their employment with clear and specific task statements, and employees should receive training on how to complete each task safely. All records of employee safety and onboarding training should be standardized and updated. Consistent disciplinary procedures and creative incentive programs should make safety expectations clear. Employers also should consider requiring commercial driver's licenses for any employee required to drive a company vehicle. Additionally, employers should maintain an employment environment that respects due process and strive for fairness in their dealings with employees. Finally, once all policies and procedures have been updated, employers should provide mandatory training to inform all employees of the changes in the employer/employee relationship. Include your corporate attorney and human resources professionals in this process to ensure that all changes are implemented correctly and liability is properly mitigated.

II. Implications of a Broad Interpretation of Tribal Sovereign Immunity

If the United States Supreme Court rules in favor of a broad interpretation of tribal sovereign immunity, the result will be that neither tribes nor their employees can be sued in state or federal court for their tortious acts. This is the current state of the law in Oklahoma, but tribal employers

should recognize the downside to such a ruling: it could make employees more tolerant of negligence. If employees do not think they can be sued for negligence, they may become more careless in their jobs and cause harm to others. Tribes should address this misconception by issuing a clear statement explaining to employees that they are still potentially liable for negligent acts, even in a tribal court.

The statement should also indicate that tribal employers always make safety a top priority. The recommendations listed above in the case of a narrow interpretation of tribal sovereign immunity are still good business practices for ensuring safety and arguably should be implemented regardless of which way the Supreme Court rules. Although these recommendations become less time sensitive under a broad interpretation, tribal employers should still be moving towards them to help maintain a competitive advantage in the highly competitive hotel/gaming industry. Tribal courts, for example, also expect current records documenting employee training, so check with managers to ensure that accurate records are being kept.

In addition to avoiding suggesting an employment environment that tolerates negligence, a second consideration for tribal employers under a broad interpretation of tribal sovereign immunity is negative public relations. A broad interpretation could create a stigma around tribal entities—a misconception that people may not be as safe in tribal businesses or do not have the same rights to damages if they are harmed. This stigma could keep potential customers away from tribal businesses and could affect the bottom-line. Tribal employers should invest in positive marketing to off-set any stigma that may result from the public's misperception of the law and work to maintain a reputation of excellent customer service and ethical business practices.

In sum, whether the U.S. Supreme Court rules in favor of a narrow interpretation of tribal sovereign immunity or a broad one, tribal employers should be prepared with a response.

Oklahoma tribes must respond in a timely and ethical manner to sustain a competitive advantage.

It is my desire that my work might help Human Resource professionals at tribal entities navigate through the implications of *Lewis v. Clarke* for the benefit of their respective businesses and tribes. Likewise, it is my desire to advocate for the protection of Oklahoma tribal employees.

This case is sure to affect tribal entities regardless of how the U.S. Supreme Court rules. The job of Human Resource professionals requires the ability to adapt to this rapidly changing legal environment and to ensure the security of tribal businesses and employees for the benefit of all Oklahoma tribes and constituents.

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